Supreme Court, U.S.
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No. 95-1471

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MARTA M. MOTLEY,
Petitioner,

v.

MARATHON OIL COMPANY,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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April 12, 1996

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the crime–fraud exception to the attorney–client privilege has been expanded to include alleged torts.

LIST OF PARTIES

The caption contains all of the parties to the proceedings before the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of Oklahoma.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Marathon Oil Company is a wholly-owned subsidiary of USX Corporation, a Delaware corporation.

The following are subsidiaries of USX Corporation which are traded on the NYSE: USX-US Steel, USX-Marathon, USX-Delhi Gas Pipeline.

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On Petition For Writ Of Certiorari To The United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent, Marathon Oil Company, respectfully requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in No. 95-6014 filed December 15, 1995, be denied.

OPINIONS BELOW

The order of the United States Court of Appeals for the Tenth Circuit entered on Dec. 15, 1995, affirming the orders of the district court is reprinted in Petitioner's Appendix A. The official citation is *Motley v. Marathon Oil Co.*, 71 F.3d 1547 (10th Cir. 1995).

The order of the United States District Court for the Western District of Oklahoma entered on Oct. 7, 1994, denying plaintiff's motion to compel discovery is reprinted in Petitioner's Appendix B. There is no official citation for the district court's order.

The order of the United States District Court for the Western District of Oklahoma entered on Oct. 21, 1994, denying plaintiff's request to reconsider denial of her motion to compel discovery is reprinted in Petitioner's Appendix C. There is no official citation for the district court's order.

STATEMENT OF JURISDICTION

The order and judgment of the United States Court of Appeals for the Tenth Circuit was entered on Dec. 15, 1995. No petition for rehearing was filed. The petition for writ of certiorari was filed within ninety (90) days of the order and judgment pursuant to Rule 13.1 of the Supreme Court Rules. The Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

1. In The District Court

Petitioner, Marta Motley ("Motley") sued Respondent Marathon Oil Company ("Marathon") and claimed that when Marathon reduced its workforce, it terminated her employment on account of her race, Caucasian, in violation of Title VII of the Civil Rights Act of 1964 and in violation of Oklahoma's public policy. Marathon denied her allegations and, after a three-day trial, the jury returned a verdict in favor of Marathon on both the state and federal claims.

Prior to trial, Motley sought to compel production of two documents which Marathon listed as protected by the attorney-client privilege. These documents concerned legal advice that Marathon's in-house counsel, John M. Miller ("Miller"), gave to Marathon prior to the reduction-in-force ("RIF"). The Privilege Log described the two documents as:

Draft of a May 21, 1992, memo from the Law Department on proposed guidelines for implementation of involuntary terminations, and

Lists prepared at the request of John Miller, attorney, which he used to advise the Restructuring Oversight Committee.

Motley challenged application of the privilege on several grounds. Her petition, however, is confined to her assertion that these documents were not privileged because Miller had allegedly planned, participated in or advised his client to commit a tort.

The district court reviewed Miller's deposition and his affidavit when it ruled on Motley's motion to compel production of the two privileged documents. The district court also considered the evidence Motley offered: "the Morrison memorandum . . . notes prepared by Becker, Becker's deposition testimony, an interrogatory answer . . . and affidavit of her own counsel, all of which she claimed showed that Marathon engaged in racial discrimination when it effected its reduction in force." *Motley*, 71 F.3d at 1551.

The district court ruled that the privilege was properly invoked by Marathon. The court held that the Tenth Circuit has not extended the crime-fraud exception to the attorney-client privilege to communications made to further or plan the commission of a tort. The court further held that the documents were prepared for the purpose of giving legal advice, not business advice. Furthermore, the court found that the attorney-client privilege was not waived merely by placing the advice of the attorney at issue and by designating

its house counsel as corporate representative for deposition about the activities of the Restructuring Oversight Committee ("ROC").

Motley requested that the district court reconsider the denial of her motion to compel and contended that the court overlooked federal law. The district court once again denied Motley's request for production. The court stated that in its own independent research, "found no Supreme Court or Tenth Circuit case holding that the crime–fraud exception to the attorney–client extends to communications relating to the planning or commission of ordinary torts." Pet'r's App. C at 2–3.

2. In The Court of Appeals

After the jury found that Marathon did not discriminate against Motley, Motley appealed the district court discovery and evidentiary rulings to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed the district court's rulings. Most importantly, the Tenth Circuit upheld the lower court's finding that the crime–fraud exception has not extended the privilege to include tortious conduct generally, but is limited to attorney advice in furtherance of a crime or fraud. Furthermore, the Tenth Circuit determined that Motley offered no evidence that the attorney participated in a crime or fraud; or that the two documents involved furthering a crime or fraud. The appellate court also affirmed the evidentiary ruling which Motley does not seek to reverse. *Motley*, 71 F.3d at 1553.

B. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.2, respondent brings the following misstatements of facts contained in Motley's petition to the Court's attention.

Petitioner misrepresents to the Court, as she has done throughout this matter, that the privileged documents which she was denied were "**notes** regarding the activities of the Restructuring Oversight Committee." (Emphasis added) (Petition at 3). The privilege log clearly describes the document in question as "Lists." *Supra* at 4. Moreover, when Motley took the deposition of Miller prior to filing her motion to compel, she learned that none of the committee members retained documents of the ROC activities and that Miller did not take notes.

Petitioner also misrepresents to the Court that "Marathon did not contest the existence of a prima facie case of intention to commit a tort." (Petition at 3). Marathon argued that the privileged documents were for the purpose of legal advice and there was no evidence of intent to commit a tort.

Petitioner grossly misstates the district court's ruling when she states that the court did not conduct an *in camera* review because "an attorney's involvement in planning an intentional tort was shielded by the attorney–client privilege." (Petition at 4). The court held the crime–fraud exception to the attorney–client privilege "has not to date been extended . . . to communications made to further or plan the commission of a tort." (Pet'r's App. B at 2).

Petitioner misrepresents to the Court that Marathon was at fault because Motley did not discover earlier "explanations offered by Marathon for the exercise of its business judgment." (Petition at 4). As the appellate court noted, Motley did not begin discovery until less than two months before discovery cut-off. *Motley*, 71 F.3d at 1552. She did not depose witnesses until one week before discovery cut-off which was twenty-three days after the original discovery cut-off date.

Petitioner infers throughout her petition that Marathon's attorney advised the company to commit a tort and that a tort occurred. Her question for review is framed to suggest the attorney participated in the future planning of a tort and that a tort resulted. (Petition at 5). Such statements are absolutely without foundation in fact. There was no evidence that Marathon's attorney either advised his client or participated with his client in the planning or commission of a tort. There is no evidence that Miller or the ROC ever discussed that Motley was to be terminated or that the documents in questions were ever used in the decision to discharge Motley or eliminate the position which she held. Thus, in this case, petitioner cannot even support the assertion that a tort occurred or that Miller was involved..

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT WITH THE DECISIONS OF THE COURT

Petitioner erroneously asserts that the Tenth Circuit decision "appears" to conflict with two opinions of this Court, specifically, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1996, 85 L.Ed.2d 372 (1985) and *United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L.Ed.2d 469 (1989). Neither *Weintraub* nor *Zolin* held that the crime–fraud exception should be expanded to include torts.

In *Weintraub*, the Court ruled that a bankruptcy trustee could waive the attorney–client privilege with respect to communications that took place before the filing of the petition in bankruptcy. *Weintraub,* 105 S. Ct. at 1996. The opinion contains no mention of an expansion of the crime–fraud exception to include torts. Petitioner quotes from *Weintraub*, not the holding of the case or an opinion of the Court, but the argument of one party: "the corporation's attorney–client privilege . . . does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary torts." *Id.* at 1993–94. (Petition at 6). Petitioner, however, omits the *Weintraub* Court's response to the quoted argument: "The problem, however, is making the threshold showing of *fraud* necessary to defeat the privilege." *Weintraub*, 105 S. Ct. at 1994 (emphasis added). *Weintraub* is about fraud not torts.

The second case cited by petitioner, *Zolin,* concerned a criminal tax investigation. The Court held that an *in camera* inspection of allegedly privileged material may be made where there is sufficient evidence to support a reasonable belief that such a review may yield evidence that triggers the crime–fraud exception. *Zolin*, 109 S. Ct. at 2632. The *Zolin* court did not address expansion of the crime–fraud exception.

There is no conflict between the Tenth Circuit's opinion and the Court's decisions because the Court has not held that the crime–fraud exception applies to torts. Petitioner has no basis for certiorari under this theory.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioner contends that certiorari should be granted because there is a conflict among the circuits as to whether the crime–fraud exception should be extended to include torts. Petitioner does not, however, establish that such a conflict exists. Petitioner cites **no** cases which have extended the crime–fraud exception to torts. Without such authority, petitioner has no conflict.

The seven circuit opinions which petitioner refers to do not create a conflict because they do **not** expand the crime–fraud exception. Petitioner does not cite these seven cases for their rulings. Instead, petitioner cites them merely because they quote a 1950 Massachusetts district court decision, *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950). In *dicta*, the district court listed the elements of the attorney–client privilege

which included an element that the privilege does not apply to communications "for the purpose of committing a crime or tort." Neither *United Shoe* nor the seven cases cited by petitioner applies the crime–fraud exception to anything but criminal conduct or fraud:

(1) *In re Sealed Case*, 737 F.2d 94, 101 n.11 (D.C. Cir. 1984), concerned criminal allegations in a grand jury investigation and the privilege was allowed where the information was confidential legal advice and not "in furtherance of a crime."

(2) In *Rhone–Poulenc Rorer, Inc. v. Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994), the parameters of the crime–fraud exception were not addressed. Instead, the court held that the attorney–client privilege was not waived by putting state of mind at issue. *Id.* at 866.

(3) *In re Grand Jury Proceedings*, 727 F.2d 1352, 1358 (4th Cir. 1984), involved criminal allegations in a grand jury investigation and the privilege was denied because confidentiality was not intended.

(4) *In re Grand Jury Investigation*, 599 F.2d 1224, 1237 (3d Cir. 1979), did not apply the crime–fraud exception; the privilege was denied because employees interviewed by the attorney were not in the control group.

(5) In *United States v. Fortna*, 796 F.2d 724, 730–31 (5th Cir. 1986), *cert. denied*, 479 U.S. 950, 107 S. Ct. 437, 93 L.Ed.2d 386, the defendant was convicted of conspiracy to import cocaine; the case was remanded to allow the

defendant the opportunity to prove that his communications with counsel were confidential and did not concern the alleged crime.

(6) As to *In re Grand Jury Proceedings*, 689 F.2d 1351 (11th Cir. 1982), the privilege was denied because the subpoenaed documents concerned marijuana smuggling.

(7) In *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977) the crime–fraud exception was not addressed; the attorney–client privilege was denied because the information was not confidential and it concerned business, rather than legal, advice.

There is no conflict among the circuits on this issue. Courts from each of the federal circuits define the crime–fraud exception in terms of criminal conduct or fraud. *United States v. Richard Roe, Inc.* 68 F.3d 38, 40 (2d Cir. 1995) (to invoke crime–fraud exception, a party must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and communications were in furtherance thereof); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1416 (11th Cir. 1994) (exception requires that attorney's communication further criminal or fraudulent activity); *Sandberg v. Virginia Bankshares, Inc.*, 979 F. 2d 332 (4th Cir. 1992) (under crime–fraud exception, communications with attorney for purpose of perpetrating or facilitating crime or fraud in the future are not privileged); *United States v. De La Jara*, 973 F.2d 746, 748 (9th Cir. 1992) (to successfully invoke crime–fraud exception, party must make prima facie showing that attorney was retained in order to promote

intended or continuing criminal or fraudulent activity); *United States v. Aucoin*, 964 F.2d 1492, 1498 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 661, 121 L.Ed.2d 587 (crime-fraud exception applied because there was prima facie evidence that defendant's communications with counsel concerned his criminal activities); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992) (communication is unprotected by the privilege if it gives direction for commission of future fraud or crime); *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992) (attorney-client privilege does not apply to legal advice in aid of fraudulent scheme or crime; there was evidence of securities fraud); *Charles Woods Television Corp. v. Capital Cities/ABC, Inc.*, 869 F.2d 1155, 1161-62 (8th Cir. 1989), *cert. denied*, 493 U.S. 848, 110 S. Ct. 145, 107 L.Ed.2d 104 (exception did not apply because party failed to make a prima facie showing that communication was in furtherance of a fraud and communication bore a close relationship to the fraud); *In re Grand Jury Proceedings*, 857 F. 2d 710, 712 (10th Cir. 1988), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3214, 106 L.Ed.2d 565 (1989) (attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud); *In re Appl'n of United States*, 723 F.2d 1022, 1026 (1st Cir. 1983) (communications which concern illegal activities are not protected by privilege; case involved suspected criminal activity); *United States v. Mardian*, 546 F.2d 973, 982 (D.C. Cir. 1976) (attorney-client privilege does not extend to communications which are in aid of crime or fraud)[1]; *United*

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[1] In two cases from the D.C. Circuit, the court used the language "crime, fraud or other misconduct." Both, however, involved allegations of criminal conduct and neither

States v. Aldridge, 484 F. 2d 655, 658 (7th Cir. 1973), *cert. denied sub nom Good v. United States*, 415 U.S. 921, 94 S.Ct. 1423, 39 L.Ed.2d 477 (1974) (privilege does not apply to communications made in furtherance of continuing or future fraud or crime).

In order to support certiorari, a conflict between the circuits must be a real and direct conflict as to the law, not merely an inconsistency in *dicta*. *Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813, 51 S. Ct. 214 (1931) (asserted conflict in decisions arises from factual differences and not in the application of principle of law; writ of certiorari dismissed as improvidently granted); *Keller v. Adams-Campbell Co.*, 264 U.S. 314, 44 S. Ct. 356 (1924) (close examination of court of appeals' decisions reveals no conflict; writ of certiorari dismissed, at the costs of petitioner).

Petitioner cannot establish a conflict because she cites no circuit cases which have extended the crime-fraud exception to torts. Petitioner's reliance upon the treatise, 8 Wigmore, Evidence § 2298, 573 (1961), is not enough. A conflict among commentators cited in the treatise does not support certiorari. Petitioner's writ should be denied.

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extended the crime-fraud exception to include torts. *United States v. White*, 887 F. 2d 267, 271 (D.C. Cir. 1989) (exception not applied because communication did not "further a crime or fraud") and *In re Sealed Case*, 754 F. 2d 395, 399 (D.C. Cir. 1985) (in context of grand jury investigation of tax fraud and destruction of evidence, crime-fraud exception applied because there was ample evidence that communications aided the "illegal and fraudulent scheme").

III.

THERE IS NO CONFLICT WITH STATE LAW

Petitioner pleaded a state law claim as well as a federal statutory cause of action. Under Federal Rules of Evidence, state privilege law applies to state claims. 28 U.S.C. § 501. The Tenth Circuit considered Motley's arguments under both Oklahoma and federal privilege law and concluded that the crime–fraud exception is triggered by a crime or fraud and not by ordinary torts.

The Tenth Circuit's application of Oklahoma law to the state cause of action is correct. Citing *White v. American Airlines, Inc.*, 915 F.2d 1414, 1424 (10th Cir. 1990), the court stated "[w]e have held that 'some type of prima facie showing of a crime or fraud is required under Oklahoma law in order to trigger the applicability of the crime–fraud exception.'" *Motley*, 71 F.3d at 1551. Oklahoma has a comprehensive statute on attorney–client privilege. Okla. Stat. tit. 12, § 2502 (1994). That statute provides, in part, that

> D. There is no privilege under this rule:
>
> > 1. If the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

The statute does not mention torts as providing an exception to the attorney–client privilege. Oklahoma applies the crime–fraud exception only where the conduct is clearly a crime or

fraud. *See Keller v. State*, 651 P.2d 1339, 1342 (Okla. Crim. App. 1982) (murder); *Cole v. State*, 298 P. 892, 895 (Okla. Crim. App. 1931) (murder); *Morris v. State*, 115 P. 1030, 1037 (Okla. Crim. App. 1911) (felony of creating false document for use at trial).

Where both state and federal claims are pursued in a federal forum, if state privilege law is consistent or compatible with federal privilege law, the two should be read together in order to accommodate the legitimate expectations of the state's citizens. *Pagano v. Oroville Hosp.*, 145 F.R.D. 683 (E.D. Cal. 1993). Where a court can harmonize the provisions of state privilege law with federal discovery law, then the state law should be followed. *Id.* at 688. The principles of comity between state and federal sovereignties also compel federal courts to recognize state privilege law where this can be accomplished at no substantial cost to federal substantive and procedural policy. *Smith v. Alice Peck Day Mem. Hosp.*, 148 F.R.D. 51, 54 (D. N.H. 1993) *citing United States v. King*, 73 F.R.D. 103, 105 (E.D. N.Y. 1976); *Wei v. Bodner*, 127 F.R.D. 91, 95 (D. N.J. 1989) (state privilege should be considered in federal question cases by balancing the need for discovery against the importance of the policies behind the privilege).

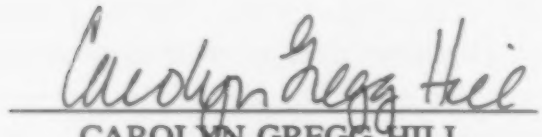
Oklahoma law should neither be ignored nor changed. To expand the crime–fraud exception to the attorney–client privilege to include torts and civil rights claims would be an unwarranted alteration of Oklahoma law. *See Hyde Constr. Co. v. Koehring Co.*, 455 F.2d 337, 342 (5th Cir. 1972) (court declined to expand crime–fraud exception to include

torts because there was no state law decision on the issue and to do so would be a considerable expansion of state law).

CONCLUSION

For the reasons above, the petition for writ of certiorari should be denied.

Respectfully submitted,



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